

## **REMARKS/ARGUMENTS**

### **Status of the Claims**

Claims 1, 5, 19, and 27 have been amended to replace "90%" with "--93%--" in parts (a) and (b) of each of these claims. Support for this amendment can be found in the specification, particularly on page 16 at lines 1-6.

Claims 2 and 12 have been amended to independent form. Claim 2 has been amended in incorporate the limitations of amended claim 1. Claim 12 has been amended to incorporate the limitations of amended claim 5. Applicants have amended claims 2 and 12 to independent form to place the instant application in a condition ready for allowance and not for the purpose of limiting the scope of their claimed invention. These amendments are fully supported by original claims 1, 2, 5, and 12 and the specification.

Claims 13-18 have been amended to change claim dependency due to the amendment of claim 12 to independent form. Amended claims 13-15 and 17 depend from independent claim 12. Amended claims 16 and 18 depend from amended claims 15 and 17, respectively. Claims 13-18 have also been amended to include limitations of the claims from which they previously depended, claims 6-11, respectively. Applicants have amended claims 13-18 to place the instant application in a form ready for allowance and not for the purpose of limiting the scope of their claimed invention. These amendments are fully supported by original claims 1, 2, 5, and 12-18 and the specification.

Claim 19 has been further amended to correct an obvious typographical error that was inadvertently introduced in the Amendment filed October 17, 2006. In that Amendment, part (b) of claim 19 was inadvertently labeled as part (d). Applicants have amended claim 19 to correct this inadvertent typographical error. This amendment to claim 19 is purely formal in nature and does not introduce new matter.

No new matter has been added by way of amendment of the claims.

Claims 1-27 remain pending.

Reexamination and reconsideration of the application as amended are respectfully requested.

The Rejection of the Claims for Nonstatutory, Double Patenting Should Be Withdrawn

Claims 1-27 have been rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-23 of U.S. Patent No. 7,041,874<sup>1</sup>. Claims 1, 2, 5, 12-18 19, and 27 have been amended. This rejection is respectfully traversed.

The Office Action indicates that, although claims 1-27 of the instant application are not identical to claims 1-23 of U.S. Patent No. 7,041,874, they are not patentably distinct from each other because Applicants have admitted on page 49 of the instant specification and on page 13 of their last response to the Office that the subject matter of U.S. Patent No. 7,041,874 falls within the claimed genus of the instant application. The Office Action then asserts that the species taught in U.S. Patent No. 7,041,874 renders obvious the genus claimed in the instant application.

Although the Office Action did not specify with particularity that nature of Applicants' admission, Applicants assume that the Office Action is referring to Applicants' disclosure that the Dw3 gene is 92% and 91.8% identical to the Br2 gene at the nucleotide and amino acid sequence level, respectively. If this is not the admission that the Examiner referred to in the Office Action, Applicants respectfully request that the Examiner state with specificity Applicants' admission in the next non-final Office Action so as to provide Applicants with an opportunity to respond.

Applicants have amended claims 1, 2, 5, 12, 19, and 27 to be directed to nucleotide sequences having at least 93% identity to the sequence set forth in SEQ ID NO: 7 and/or SEQ ID

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<sup>1</sup> U.S. Patent No. 7,041,874 issued with only 21 claims. Applicants assume for the purposes of this response that the Examiner intended to cite claims 1-21 of the U.S. Patent No. 7,041,874 as the basis for rejecting claims 1-27 of the instant application under the judicially created doctrine of obviousness-type, double patenting. If Applicants' assumption is incorrect, Applicants respectfully request that the Examiner indicate in the next non-final Office Action the particular claims of U.S. Patent No. 7,041,874 upon which this rejection is based so as to provide Applicants with an opportunity to respond.

NO: 8, and complements thereof. Following these amendments, the species taught in U.S. Patent No. 7,041,874 does not fall within the scope of claims 1, 2, 5, 12, 19, and 27 and their respective dependent claims. Accordingly, the species taught in U.S. Patent No. 7,041,874 does not render obvious the claimed genus.

Applicants have not, however, amended claim 4. In contrast to the view of the Office Action, the species taught in U.S. Patent No. 7,041,874 does not fall within the scope of claim 4. Claim 4 is directed to an isolated nucleic acid molecule comprising a nucleotide sequence having at least 95% identity to the sequence set forth in SEQ ID NO: 7 and/or SEQ ID NO: 8, and complements thereof. Accordingly, the species taught in U.S. Patent No. 7,041,874 fails to render obvious the claimed genus of claim 4.

In view of the amendments and remarks, it is submitted that the rejection under the judicially created doctrine of obviousness-type double patenting should be withdrawn.

The Rejection of the Claims Under 35 U.S.C. § 102(e) Should Be Withdrawn

Claims 1-27 have been rejected under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent No. 7,041,874 to Johal *et al.* Claims 1, 2, 5, 12-18 19, and 27 have been amended. This rejection is respectfully traversed.

The Office Action indicates that the claims of the instant application are only entitled to the priority date of November 13, 2000.

The Office Action indicates that U.S. Patent No. 7,041,874 discloses the Br2 gene encoding a P-glycoprotein and its use in modifying the growth of plants and claims transformed plants comprising the Br2 gene and a method of modifying growth of a plant comprising transforming a plant with the Br2 gene. The Office Action further indicates that instant application discloses that the Dw3 gene is 92% and 91.8% identical to the Br2 gene at the nucleotide and amino acid sequence level, respectively.

Applicants have amended claims 1, 2, 5, 12, 19, and 27 to be directed to nucleotide sequences having at least 93% identity to the sequence set forth in SEQ ID NO: 7 and/or SEQ ID NO: 8, and complements thereof. As amended, claims 1, 2, 5, 12, 19, and 27 and their respective dependent claims are not anticipated by U.S. Patent No. 7,041,874.

Applicants have not, however, amended claim 4. Claim 4 is directed to an isolated nucleic acid molecule comprising a nucleotide sequence having at least 95% identity to the sequence set forth in SEQ ID NO: 7 and/or SEQ ID NO: 8, and complements thereof. The Office Action does not indicate that U.S. Patent No. 7,041,874 discloses a nucleotide sequence that has at least 95% identity to the sequence set forth in SEQ ID NO: 7 or SEQ ID NO: 8, or any complements of such sequences. Accordingly, claim 4 is not anticipated by U.S. Patent No. 7,041,874.

In view of the amendments and remarks, it is submitted that the rejection under 35 U.S.C. § 102(e) should be withdrawn.

### CONCLUSIONS

In view of the above amendments and remarks, Applicants submit that the rejections of the claims under the judicially created doctrine of obviousness-type double patenting and 35 U.S.C. § 102 are overcome. Applicants respectfully submit that this application is now in condition for allowance. Early notice to this effect is solicited.

If in the opinion of the Examiner a telephone conference would expedite the prosecution of the subject application, the Examiner is invited to call the undersigned.

It is not believed that extensions of time or fees for net addition of claims are required, beyond those that may otherwise be provided for in documents accompanying this paper. However, in the event that additional extensions of time are necessary to allow consideration of this paper, such extensions are hereby petitioned under 37 CFR § 1.136(a), and any fee required

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therefore (including fees for net addition of claims) is hereby authorized to be charged to Deposit Account No. 16-0605.

Respectfully submitted,

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